TRIBAL ECOLOGICAL KNOWLEDGE AND THE TRANSITION TO ECOLOGICAL LAW

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Abstract: Proposals for "ecological law" are premised upon a need to protect and restore ecological systems using a holistic approach, which is fundamentally representative and just. Although the definition of ecological law is still being debated, and constructed, support for it is growing in various nations. In the United States, ecological law has been slow to gain traction, and yet its practical potential could be an important means of responding to the challenges that the United States will face in addressing social injustice and ecological degradation. On tribal lands, ecological law principles are reflected in tribal laws governing natural resource use and management, as well as ecological protection. Outside tribal lands, legal and jurisdictional boundaries limit the extent to which indigenous ecological law principles are used to protect ecosystems, species, and the broader global climate. Yet, one tribal coalition has found a way to work around these barriers using unique natural resource collaborative management agreements, which have provided a means of returning indigenous knowledge of ecosystems and ecological history to the Bears Ears region. This chapter explores the history of the Bears Ears model, the potential for tribal ecological knowledge it holds, and argues for a similar model in ecological law.

Introduction

The dawn of environmental law in the United States in the 1970s brought great promises of reversing many of the harmful effects of the industrial revolution, the explosion of post-war consumerism, and the hope that better laws could improve human health and the quality of human life (Houck 2019). The fifty years that followed the passage of landmark laws like the Clean Air Act, the Clean Water Act, and the National Environmental Policy Act brought some improvements to environmental quality, but have largely failed to bring about the general shift in environmental health and ecological integrity that they prophesied (ELGA 2016). One reason for this is a significant design flaw in the statutes, which take a piecemeal approach to improving environmental quality and ecological health. They also lack specificity in places, which allowed politically driven governmental agencies to "interpret" the statutes in a way that sometimes

undermines their intended purpose (Chevron v. NRDC). Critically, these statutes largely ignored indigenous nations, or included them as a legislative afterthought (LaDuke 1999).

In an attempt to address the failings of this approach to improving environmental quality, there are calls for a new system of laws for the future. This system, which some call ecological law, is rooted in the need to protect and restore ecological systems (Wroth 2019). According to the Oslo Manifesto for Ecological Law and Governance, the new system demands an approach to law "based on ecocentrism, holism, and intra-/intergenerational and interspecies justice" (ELGA 2016). In the United States, support for a wholesale shift to ecological law has been somewhat minimal except amongst academics (Houck 2019), and courts have been very skeptical of claims advancing ecological rights, particularly the "rights of nature" (Boyd 2018). Although this reluctance may have slowed the implementation of ecological law principles in the U.S., it has in other ways provided the nation with an opportunity – a chance to design a system of ecological law that represents the values of 21st century America.

Essential components of this system are the ecological laws, science, and other ecological knowledge of the nation's first environmental stewards. Indigenous scholars have been advocating for greater inclusion of indigenous ecological knowledge in environmental law for decades, but these calls have not yet resonated in the halls of Congress (LaDuke 1994; Tsosie 1996, 245). This chapter focuses on developing legal protections for the use of tribal ecological knowledge outside what is known in U.S. law as Indian Country, or the areas in which tribes have legal authority to regulate and manage without external interference. Outside Indian Country, tribes must work with federal agencies to protect tribal values in what are now deemed

"federal" lands, and short of a wholesale revision of federal environmental laws in the U.S., tribes must continue to find innovative ways to use existing laws and legal doctrines to apply tribal ecological knowledge outside Indian Country. One of those ways is the subject of this chapter.

Historical Foundations – Colonization and the Suppression of Indigenous Law and Peoples in the U.S.

As United States Supreme Court Chief Justice John Marshall wrote in 1831, "the relations of the Indians to the United States is [sic] marked by peculiar and cardinal distinctions which exist no where else" (Cherokee Nation v. Georgia). These peculiarities and distinctions have resulted in a legal system in which tribes occupy an important Constitutional (and sometimes, extra-Constitutional) role, as sovereign governmental entities overseeing millions of acres of Indian Country, encompassing a vast array of diverse ecosystems throughout the United States, while being legally excluded from decision making processes involving other lands owned by the federal government, states, and non-indigenous citizens (Kronk Warner 2016, 953; Hoffmann 2017). This legal system is dichotomous in ways that are hard for even seasoned scholars of Indian Law to comprehend – for example, the Supreme Court recognizes tribal governments as sovereign, yet the Court also recognizes that Congress possesses "plenary power" over their lands (Hoffmann 2017, 359). In the area of environmental law, this has translated into a relative mishmash of alternating tribal, federal, and state authority, within Indian Country, and beyond, which has rendered holistic management of many ecosystems quite difficult, if not impossible (Hoffmann 2017).

The roots of the current system of environmental law began at contact - when Europeans arrived in what is now the United States and encountered indigenous nations that had deep-rooted connections with their lands and the attendant ecological systems dating back thousands of years (LaDuke 1994, Tsosie 1996). While the Europeans were in some ways reliant on indigenous peoples to share their ecological knowledge for the benefit of the newly forming colonies, they also simultaneously feared indigenous peoples and wanted their land (LaDuke 1994). The desire for land propelled the signing of many treaties, in which tribes retained legal rights to access and use ceded lands and waters for cultural, subsistence, and other purposes, and the U.S. government gained land for its burgeoning population (Hoffmann and Mills, 2020). When treaties failed, Congress passed statutes authorizing wholesale seizure of indigenous lands, and the European fears of cultural contamination and savagery were used to justify these acts in the earliest Supreme Court cases deciding the relative legal rights of indigenous and Euro-American peoples (Johnson v. M'Intosh). Those early cases created rules of law that indigenous peoples lacked the same legal rights to land as non-indigenous peoples, and yet cemented the principle of tribal sovereignty over tribal lands (Hoffmann and Mills 2020, ch. 2). In these early cases, the Court also drew a jurisdictional line around what it called Indian Country – inside the boundaries, tribes generally had jurisdiction and regulatory authority, subject to a few exceptions, and elsewhere, tribes lack jurisdiction and regulatory authority, unless Congress has authorized it, or the tribe reserved those rights in a treaty (Oliphant v. Suquamish Tribe).[i]

After the early Supreme Court cases established the disparate land ownership rules, the process of colonization took off with lightning speed (LaDuke 1994). Congress passed more land and resource-acquisition statutes, which were implemented with gusto by the Executive Branch,

divesting tribes of nearly two-thirds of their land base by the end of the 19th century. As conflicts between tribes and settlers, states, and corporations inevitably arose, their resolution by the Supreme Court nearly always skewed against the tribes (Hoffmann and Mills 2020). The effect of this near plenary colonization, which some have labeled a genocide, destroyed some tribal governments permanently, left others in tatters, displaced people from their lands, removed aspects of tribal sovereignty, prohibited the use of indigenous languages and religious rituals used to transmit history, and in certain periods, attempted to extinguish indigenous nations outright (LaDuke 1994; Deloria 2003). Colonization was particularly effective in severing indigenous connections to land through the 19th century laws of removal and allotment, during which the U.S. government forcibly removed tribal nations from their homelands and moved them to reservations, sometimes in far distant states or territories (LaDuke 1994).

At the same time, Congress passed dozens of statutes aimed at spurring non-indigenous settlement of what were once indigenous lands, and development of natural resources like minerals, timber, and water. (Coggins) The laws that Congress passed during this period were based on the principle of Manifest Destiny, in which Christian "armies" of European settlers would march across the North American continent, "settle" its lands, and claim their birthright in the name of God and country (Miller 2016, 8) Between 1887 and 1934, "the total Indian land estate dropped from 140 million acres … to 50 million acres …, thus transferring about seven percent of all land in the forty-eight states to non-Indian settlers and corporations" (8). The European-derived legal system used to effectuate this colonization of tribal lands brought notions of dominion over natural resources, and the concept of legal ownership not only of land, but also of components of an ecosystem, which sometimes legally severed ecosystems into different legal

"estates."[ii] Under this system, one individual or corporate entity could acquire legal rights to a parcel of land, and others could acquire rights to the trees growing there, or the water or minerals underneath it (Coggins 2014).

As a result of the overuse and depletion of natural resources during the nineteenth century, even tribes that had negotiated treaty rights to hunt, gather, and fish on ceded lands (now subject to state and federal jurisdiction) could not exercise their legal rights. Moreover, the vast majority of tribes that did not secure treaty rights guaranteeing them access to and use of extra-territorial lands and resources faced even more perilous battles. The Europeans and European-Americans were so effective in decimating some of these tribes, such as the indigenous nations of the New England region, that indigenous knowledge of these ecosystems has been removed from the decision making regime in these places for over 200 years (Hoffmann and Mills 2020). In the New England of the twenty-first century, there is no Indian Country, there are very few federally recognized tribes, and there are no laws requiring indigenous consent to use and develop former indigenous lands, much less any laws requiring consultation about indigenous ecological knowledge (Hoffmann and Mills 2020).

Indigenous Ecological Knowledge and the Dawn of Environmental Law

The effects of colonization on indigenous ecological knowledge vary depending on the indigenous nation and the methods it used to survive colonization. For tribes that managed to remain on their ancestral lands, ecological knowledge was successfully preserved and transmitted to younger generations (for example, in the Navajo Nation Code), ensuring a continuity of environmental law and values over time. (LaDuke 1994). For tribes that were

removed, the ecological knowledge of far away homelands may have been lost, or continually transmitted, but without any legal rights to apply it (Hoffmann and Mills 2020). Some tribes that were removed may have developed new ecological knowledge, and even codified it into tribal laws, on the reservations to which they were removed (for example, the Ho-Chunk Tribal Code). Regardless of their history, though, an aspect of tribal sovereignty is the right to ecological knowledge and values into tribal laws, which largely govern Indian Country (Hoffmann and Mills 2020).

Outside Indian Country, tribes retain significant legal rights too. Until Congress stopped the practice of making treaties with indigenous nations in 1871, the U.S. negotiated hundreds of treaties guaranteeing tribes and tribal members certain rights outside of Indian Country, and sometimes, without limits. (Carpenter 2007). These treaties ensured that tribal members could continue to hunt, fish, and gather plants and medicine "at the usual and accustomed places", even though the lands might shift to federal, state, or private ownership. (Carpenter 113). Although in some cases, Congress has abrogated treaty rights, hundreds of treaties survived the colonization period of the 19th century and are the supreme law of the land today, according to the Supremacy Clause of the U.S. Constitution. As recently as 2019, the Supreme Court recognized the strength of off-reservation treaty hunting rights for the Crow Tribe in a national forest in Wyoming, allowing tribal members to hunt on their ceded lands without state hunting licenses (Herrera v. Wyoming).

Tribal treaty rights were incorporated into a few environmental laws of the 1970s and 1980s, such as the Endangered Species Act, but the full array of tribal on-reservation and off-reservation

rights were ignored. Congress took a somewhat one-size fits all approach to the federally recognized tribes in the areas of clean air, clean water, and safe drinking water, allowing those tribes the opportunity to submit applications to the federal Environmental Protection Agency (EPA) to seek primacy in setting air quality and water quality standards on their reservations (Hoffmann 2017, 342). The system EPA adopted did at least theoretically allow a tribe to obtain regulatory primacy and use indigenous ecological knowledge to set air or water quality standards, according to tribal science and tribal values (Tsosie 1996), but there were serious limits to this system. Some tribes were excluded from it altogether because they were not federally recognized (Hoffmann 2017). Some tribes could not gain approval due to the exacting and specific standards set by EPA (Hoffmann 2017). Some tribes lacked funding and resources to hire attorneys to draft the necessary application documents, submit them, and advocate before the agency, and potentially the courts, on the tribe's behalf.

Other statutes, such as the major law regulating solid waste disposal, seemed to overlook tribes entirely (Tsosie 1996). The statutes that aimed to increase accountability of governmental agencies making decisions about environmental standards and enforcement, such as the Administrative Procedures Act, and the National Environmental Policy Act, largely treated tribal members the same as any other US citizen, which marginalized and diminished treaty rights and other sovereign rights unique to tribal nations (Tsosie 1996). Finally, the values underlying these environmental laws for indigenous peoples are arguably the wolf of colonialism, dressed in sheep's clothing of progressive environmental values (Tsosie 1996). On the whole, the system contains similar components as in the past, although with slightly different players - a federal agency, EPA or the Bureau of Indian Affairs, serves as the gate-keeper to a system of external

laws forced upon indigenous nations, allowing them to participate when they agree to shape their environmental laws in a way that fits the external goals and standards. Very few tribes have in fact opted into the environmental federalism structure of the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act (Hoffmann 2017).[iii]

For tribes that opt into this system, the regulatory power they can obtain under the Clean Air Act, Clean Water Act, and others, is worth considering, especially because it allows extra-territorial regulation, which tribes would otherwise lack according to the Supreme Court's jurisdiction rules (Hoffmann 2019, 392). At least one tribe, the Pueblo of Isleta, has used this regulatory power to impose heightened pollution control requirements on upstream municipal polluters to protect sacred tribal waters, although few others have been successful in following its lead. (Tsosie). Some tribes with off-reservation treaty rights have been able to force federal and state agencies to protect the species central to the exercise of the treaty right, such as salmon (Hoffmann and Mills, 2020). For others, though, different and more creative strategies were necessary to protect off-reservation lands and waters.

Islands of Hope: The Bears Ears Coalition Tribes and a Different Approach to Creating Off-Reservation Legal Rights to Use Tribal Ecological Knowledge

Treaty making, removal, allotment and the federal natural resources disposal era did not produce the same consequences for every tribal nation. (Krakoff 2018) The tribes of the "Four Corners" region, where the modern states of Utah, Colorado, Arizona and New Mexico meet, resisted allotment and the accompanying federal policy of assimilation heartily (Deloria 2003). The Navajo Nation, in what is now eastern Arizona and western New Mexico, experienced removal, allotment, and the establishment of a reservation, but emerged with its aboriginal territory

somewhat intact (Krakoff 2018). Other tribes of the Four Corners region, like the Hopi and Ute, experienced only one or two phases, but eventually saw devastating and "arbitrary line-drawing" around their aboriginal territory, which effectively allocated large amounts of it to another tribe, or to an encroaching state (Krakoff 2018). Yet others, like the pueblos of New Mexico, were able to protect islands of sovereign lands and villages from the destructive reach of federal Indian policy, although they lost access to the arable river bottoms that they once farmed (Krakoff 2018).

The Ute tribes of the Colorado Plateau were historically semi-nomadic, moving from alpine camps in the Rocky Mountains in the summer down to the high desert lands of the mountains' eastern and western slopes in the winter, following the path of deer and elk, which they hunted and relied upon in numerous ways. (Maynard, 241) Ute bands were known to move up to 400 miles between seasonal camps, even before they acquired horses from the Spanish, and the western reach of their territory included a region centered around *kwiyagatu nukavachi*, or the Bears' Ears, twin buttes rising from a high desert monocline in what is now southeastern Utah (Sacred Land 2019).

Allotment and the reservation policy were devastating to the Ute people, largely because they could not continue their nomadic hunting and settlement patterns and were restricted to smaller and smaller parcels, cutting off their access to large game and seasonal camps. Eventually, they were forced onto a small reservation near Towaoc, Colorado, about 100 miles east of the Bears Ears buttes. Throughout history, the Ute people have described their relationship with the Bears Ears region, and indeed much of the Colorado Plateau, as one based in principles of stewardship

and mutual reliance. Their relationship to the land in this region is so tightly entwined that, according to Ute leader Regina Lopez-Whiteskunk, ecological protection "is who we are" (2016). Ecological protection for the Ute includes a general duty towards certain places, and also certain specific acts of caring for those places, including acts of prayer. It also reflects a long-held principle of Ute reliance on "what the land provides" for them, which includes medicinal and other plants, as well as forage for their sheep and horses.

To the south of the traditional Ute lands, the Zuni have occupied much of the territory in northeastern Arizona and northwestern New Mexico, from present day Flagstaff, Arizona, south to what is now the Tonto National Forest and east to McNary, Arizona and beyond, into western New Mexico, which is where the Zuni Reservation is located today, on a small portion of the tribe's aboriginal homelands (Zuni Tribe v. United States). The ancestral territory of the Zuni people includes *ansh an lashokdiwe*, or the Bears Ears, with the steep canyon walls descending from their flanks and relatively abundant water in the valley floors providing shelter for the cliff houses they lived in and irrigation for the crops they cultivated (Enote, Nordhaus and Huey 2018). According to Jim Enote, a Zuni hunter and farmer, "[t]he Zuni people have very strong ties to the Bears Ears area, and when the opportunity comes we make our pilgrimages back to the area to visit and to affirm what our oral history tells us. Bears Ears is a touchstone for the Zuni people" (Enote, Nordhaus and Huey). The ancestors of the Zuni people left Bears Ears in part due to climatic shifts that made the region more challenging to farm, and the story of that shift and its impact upon the Zuni is told through artwork found on cliff walls, and in Zuni blankets and pottery, even to this day (Enote, Nordhaus and Huey 2018). To the Zuni people, the Bears Ears region is a literal library of historical information, telling the oldest stories of its

ecosystems, their evolution, and the capacity of the region to maintain human habitation over time (Enote, Nordhaus and Huey 2018).

The Navajo Nation, which is the political body governing the Diné people, is another tribe occupying the lands around what they call *Shash Jaa'*, or the Bears Ears (Sacred Land 2019). The Diné people's aboriginal homelands encompass what is now the northeastern corner of Arizona, extending over the southern Utah border to the edge of the San Juan River, and east into the northwestern corner of what is now New Mexico (Navajo Tribe v. United States). Their history involves temporary forced removal to a reservation at Bosque Redondo in New Mexico, but also resistance, and ultimately, the securing of permanent rights to return and live on a large portion of their homelands, secured in 1868 by the Treaty of Ft. Sumter (Krakoff 2018). The Diné ecological knowledge of this region is vast, well documented, and particularly comprehensive in relation to large carnivore species formerly and currently found in the Grand Canyon and among the canyons and mountain ranges of the southern Colorado Plateau. (Peterson 2017) Bears, wolves, coyotes, and jaguars are important species to the Diné, and bears especially are revered for their physical and spiritual power. Coyotes are revered for their wiliness and cunning, and the stories of coyotes can only be told in winter. According to oral tradition, "the Diné performed a coyote ceremony at Bosque Rodondo where they had been forced to live after the Long Walk. This area is chosen due to the belief that the negotiators would have spiritual power, and these negotiations ultimately ended with the Diné being returned to their homeland rather than settled in Indian Territory" (Peterson 2017). In other words, according to Diné history, the coyote is a vital species because it saved the Diné people from an internment camp and helped them return to their homelands.

Diné people share some of the ecological values with the other regional tribes, but their definition of "ecological knowledge" is unique to their culture, values and history. According to these values, there are some elements of the natural world that are unknown to people, and this is a deliberate choice. Navajo people "accept the unknown and unexplained with reverence. They know that some things cannot, and should not, be explained. …[S]ome things are better left a mystery. It is those mysteries that keep Native people—including the Navajos—humble and respectful toward powers greater than themselves. This is the foundation of [Navajo] traditional ecological knowledge" (Pavlik and Tsosie 2014, 139). The definitional differences, and differences in underlying indigenous values attached to a natural resource or ecosystem from tribe to tribe, can make the task of incorporating the tribal ecological knowledge of multiple tribes into a tribal co-management framework quite complex. Yet, knowledge of the underlying cultural connections to tribal ecological knowledge is key to incorporating these values into modern natural resource decision-making processes.

For each of these tribes – the Ute, Zuni, Navajo and Hopi, the Bears Ears region is central to their culture, history, and lifeways, but outside of their jurisdictional boundaries. These tribes lack treaties that would give them legal rights to protect the Bears Ears region, or its resident plants, animals, and sacred sites, and possess no special authority under any of the specific statutes mentioned above, which would allow them to prevent mining or other destructive activities. This is because the buttes and the surrounding region are now considered federal lands, subject to the jurisdiction of the federal government, and managed by Congress, through delegations of authority to the Department of Interior, and the Bureau of Land Management

(BLM) (Krakoff 2018). Should the BLM hold different values in the Bears Ears region from the tribes, the BLM can ignore the tribal values and allow uses and activities that contravene tribal values, as long as they are consistent with Congress's broad directives in the statutes giving BLM its management authority (Hoffmann 2017). In other words, the tribes have no legal rights to protect the Bears Ears region, and no legal rights for the region to be stewarded using their traditional ecological knowledge.

This changed in the mid-2000s, when these tribes formed a coalition to propose a bilateral management framework for the Bears Ears region under the Antiquities Act, a statute passed in 1906 with the primary goal of protecting archaeological sites (Krakoff 2018). The Antiquities Act is concise – it states that "[t]he President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments" (§ 1). Once created, the objects or areas for which the national monument was established are protected according to a monument management plan, which contains detailed requirements for the federal agency overseeing the monument. Since 1906, many Presidents have used the Antiquities Act to protect not only archaeological sites, but historical monuments and important national ecosystems, which courts have recognized as "objects" of scientific interest.

One of the primary goals of the coalition in proposing protection for over 2 million acres of federal land in the Bears Ears region as a national monument was incorporating tribal ecological knowledge as part of the legally binding management framework for this place. The coalition

therefore proposed a tribal commission to advise the Bureau of Land Management on its stewardship of the Monument lands and resources, which would use the ecological knowledge of the various tribes to guide federal decision-making (Obama Pres. Procl.). The urgency for protecting this region, which had been sacred to the coalition tribes since time immemorial, was due to threats from extractive industries, such as oil and gas, and uranium, and high impact recreational use, in the form of off-road vehicles (Krakoff 2018). The Bears Ears region had been mined for uranium, oil and natural gas since the 1950s, and the results of this development have left permanent scars on the landscape, as well as a legacy of environmental injustice and human health problems like cancer and asthma in the surrounding tribal communities (Krakoff 2018)[iv].

Although they acknowledged that the task of incorporating the different values of each tribe into the decision making process within the monument would be daunting, the coalition tribes were each committed to making the Bears Ears National Monument a reality, driven by the shared goal of preserving this sacred and historic landscape for future generations (Krakoff 2018). Together, they drafted a lengthy proposal, detailing the tribal histories, connections, and values in the region, and described the critical desert and semi-desert ecosystems it contains, to support a Presidential designation under the Antiquities Act. The monument as proposed originally would contain over five separate ecosystems, in one of the most "ecologically intact regions" of the country (Coalition Proposal 2015, p. 4). This proposal gained instant acclaim among tribal communities – it was supported by more than twenty-five other southwestern tribes and ultimately, by dozens of tribes from other regions (Bears Ears Coalition 2016-2017).

Upon reviewing the proposal and consulting with various constituencies, including the tribes, state government officials, local municipalities, and many scholars of natural resources and federal Indian law, President Obama created the Bears Ears National Monument on December 28, 2016, in the twilight hours of his second term in office (Krakoff 2018). The Presidential Proclamation creating the Monument extensively details its natural and cultural resources contained within the 1.3 million acres protected, as well as their value to, and historical connections with, the coalition tribes. The Proclamation also recorded their historical and cultural connections to the Monument, and each tribe's current relationship with the Monument lands. To ensure that Monument management decisions were made with the benefit of the tribal expertise, "tribal ecological knowledge," and historical context that the coalition tribes possess, President Obama created the Bears Ears Commission, in the Proclamation. The Commission was required to include "one elected officer each from" the Coalition member tribes, who would represent that tribe's cultural and ecological values in the Monument lands and resources and help collaborate to advise the federal decision making process.

The Obama Proclamation awarded a great deal of discretion to the Bears Ears Commission by declining to cabin its authority, other than to clarify that the Commission had the authority to create and implement procedures governing its own activities and decisions. The Proclamation also contained clear mandates to the Secretaries of Interior and Agriculture – who would be tasked with co-managing the Monument lands from the federal side – limiting their discretion not to incorporate the Commission's recommendations. If the agencies declined to adopt the Commission's advice, the Proclamation required them to give formal notice of that decision, and the basis or bases for it, in writing to the Commission.

The tribal collaborative management framework created in President Obama's Proclamation was dramatically altered within a few short months, however, due to President Donald Trump's election in November 2016. When he took office in January 2017, Trump seemed to have his sights set on Bears Ears, requiring his Secretary of Interior to start reviewing it and other large monuments for potential reductions by the spring of 2017. Despite the President's signaling that Bears Ears might be reduced, in March 2017, the Bears Ears Commission members were elected and the Commission began its work, which initially consisted of defending the Monument from the President. In April, the newly appointed Secretary of Interior Ryan Zinke recommended to President Trump that he reduce Bears Ears and another Utah monument, the Grand Staircase-Escalante National Monument, which is what the President did in December 2017 (Trump Pres. Procl. 2017). Trump's Proclamation purported to reestablish the Bears Ears National Monument as a smaller Monument with two "units", releasing over 90 percent of the lands President Obama had protected and opening them to logging, mining, recreational vehicle use, and other intensive activities. Trump's Proclamation retained the tribal Commission, but renamed it the Shash Jaá Commission, using the Navajo term for the Bears Ears buttes, and limited the Commission's role to advising the federal agencies on the management of the Shash Jaá unit alone. His Proclamation eliminated the references to, and protections for, tribal ecological knowledge in the Monument, changed the recognition of "tribal ecological knowledge" to "traditional historical knowledge" and changed the membership of the Commission (to require at least one local county commissioner). The tribal response to these Proclamations was immediate; on the same day they were issued, the tribes filed suit to invalidate them, arguing that the Monument reductions were

unconstitutional, contravened the Antiquities Act and several established principles of administrative law.

Although the outcome of this litigation – and the fate of the Obama Bears Ears Monument – is in the hands of a federal district court judge in Washington, D.C. as of 2020, what is certain is that President Obama's incorporation of tribal collaborative management into the Bears Ears National Monument marked a watershed moment for the introduction (or re-introduction, as the tribes would argue) of tribal ecological knowledge into natural resource decision making outside of Indian Country. The Obama Proclamation establishing Bears Ears National Monument, with a tribal commission authorized to advise the federal agencies managing the monument using principles of tribal ecological knowledge, sets an example of the potential for incorporating tribal ecological knowledge into federal public land and public natural resources decision making, particularly for those tribes that lack treaty rights over regions or species they seek to protect or access.

The national support for the Coalition tribes and the Obama Bears Ears National Monument has grown so vast that it has attracted the attention of Congress. In 2019, Representative Debra Haaland, a citizen of the Laguna Pueblo, introduced a bill in Congress to restore the original Bears Ears National Monument, but with the expanded boundaries originally proposed by the tribes. If this bill, the Antiquities Act of 2019, passes Congress, it will reinstate the more stringent protections that President Obama established in 2016 and the tribal Commission as originally designed by President Obama. That, in turn, will allow the Commission to pivot away from its current focus, on defending the Monument lands against the Trump Administration's

relentless pursuit of energy mineral development and off-road vehicle use, and towards a prospective management framework using traditional ecological knowledge.

Conclusion – the Way Forward

If a system of ecological law is developed in the U.S., based on the values established in the Oslo Manifesto of 2016, including "ecocentrism, holism, and intra-/intergenerational and interspecies justice," it must include indigenous peoples and their ecological values (ELGA 2016). The old system of environmental laws used the rule of law to eradicate indigenous peoples and suppress their laws, values, and cultures. It also paved the way for seizing indigenous lands. The first attempt at a new way, the environmental laws of the 1970s and 1980s, did not fully address the legal framework of the colonizer era, although it reflected Congress's attempts to include tribes in environmental decision making. The next attempt at legal reform must reflect a truly inclusive, just, and representative system of environmental laws, which accurately reflect the history, diversity, and range of values of the American citizenry, including its indigenous peoples.

Examples like the Bears Ears Commission show that, in theory, and in reality, it is possible for tribes and federal agencies to use collaborative management principles to steward the vast landholdings of the American public, even under one of the old laws. Although the European-derived colonizer laws that apply to lands and natural resources outside of Indian Country are still restricted by the outdated principles driving Manifest Destiny, the discretion that many of them, like the Antiquities Act, contain has allowed indigenous peoples to establish legal rights to sit at the management table with federal agencies. Their negotiation of the terms of the Obama

Presidential Proclamation guaranteed these tribes a level of governmental access and influence to the decision making process, which they could use to propose outcomes that are more protective of tribal values and tribal ecological knowledge. The Antiquities Act in particular has created the potential for Presidents to require the use of tribal ecological knowledge to guide natural resource decision making on public lands outside of Indian Country, in some cases restoring traditional ecological knowledge to ecosystems that have not seen it used in over a century. For tribes, like the Coalition tribes, lacking treaties guaranteeing them access to, or authority over, off-reservation lands containing vital tribal resources, this collaborative management approach under the authority of the Antiquities Act is an enticing option. It also demonstrates the viability of a collaborative management system in any new framework of ecological law.

The Bears Ears model demonstrates that a transition to ecological law can benefit by, and be informed by the people with the deepest, most fundamental and comprehensive understanding of those ecosystems. Given the scope and breadth of the federal government's land holdings and its legal authority over even greater subsurface and offshore natural resources under federal law, the Bears Ears framework is a precedent for including tribal ecological knowledge in the management of ecosystems on millions of acres of federal lands. Short of returning aboriginal lands to tribes, which seems unlikely, the surest path to protecting those lands is through external (federal) laws. The potential for such laws is vast, and the potential for unique collaborative management agreements to guide the future design and implementation of ecological laws is equally so. If a statute like the Antiquities Act, the primary purpose of which is to preserve "objects of scientific interest" can be used to protect 2 million acres of high desert and desert ecosystems, using a combined approach of tribal ecological knowledge and western science and

natural resources policy, it is entirely possible for a purposefully designed federal statute to do the same, if not more, to ensure the most inclusive and just outcomes.

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[i] There are also two circumstances in which the Supreme Court has held that tribes might exercise civil regulatory authority over nonmembers and fee lands (which are not technically Indian Country, even when located inside a reservation), and that is if the non-tribal entity or party has consented to the exercise of tribal authority, or where the nonmember conduct "threatens or has some effect on the political integrity, the economic security, or the health and welfare of the tribe." *See Montana v. United States*, 450 U.S. 544, 547 (1981).

[ii] For instance, property law defines the area underneath one's property as the "subsurface estate," and it is possible for one owner to hold rights to the "surface estate," while another holds rights to the "subsurface estate." *See Tyonek Native Corp. v. Cook Inlet Region, Inc.*, 853 F.2d 727 (9th Cir. 1988).

[iii] As of 2017, less than one percent of federally recognized tribes had obtained environmental regulatory primacy under one of the federal statutes recognizing it (Hoffmann 2017).

[iv] Immediately to the south of the Bears Ears, over 40,000 oil and gas wells have been drilled in the San Juan Basin north of Santa Fe, New Mexico, in what has become labeled one of the nation's "energy sacrifice zones," where ecological harms and damage to human health is largely "written off" in the name of energy development. Tom Ribe, "New Mexico: A sacrificial zone" (Mar. 22, 2015), available at www.santafenewmexican.com.